

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

HON. KWAME M. KILPATRICK,

Plaintiff

Case No. 08-122051-CZ

Hon. Robert L. Ziolkowski

v.

HON. JENNIFER M. GRANHOLM, in
her official capacity as Governor of the
State of Michigan, and DETROIT CITY
COUNCIL,

Defendants

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**Opposition to Plaintiff's Motion for a Temporary
Restraining Order and Preliminary Injunction**

NOW COMES intervening Defendant, Detroit City Council and states in opposition to Plaintiff's motion for a temporary restraining order and preliminary injunction and in support of the Governor's motion for dismissal with prejudice, as follows:

Introduction

Plaintiff filed this action late in the day on Thursday, August 28, 2008. The City Council was served with Plaintiff's papers at approximately 4:28 p.m. While not named as a party by the Plaintiff, this Court has ordered, on the record, that under MCR 2.206(A)(2) the Detroit City Council will be allowed to permissive joinder as a party Defendant. A hearing was held before this Honorable Court, scheduled to begin at 10:00 a.m. As a consequence, the City Council was unable to file a written response, in time for that hearing. Council now files this written response to supplement the oral argument that it presented in court.

I. This Court does not have Jurisdiction to Enjoin the Governor from Undertaking Responsibilities Authorized by the Michigan Constitution and Michigan Statute

Council joins in and adopts all of the arguments and claims made in the Governor's oral arguments and pleadings herein. In addition the Council notes that the Governor's Removal Proceeding has been invoked under Article 7 §33 of the Michigan Constitution and MCL 168.327.

In addition to the cases relied upon by the Governor, in her response, Council wishes to bring to this Court's attention, in writing, the following long established black letter law in this state, from *Born v. Dilman*, 264 Mich. 440 (1933):

Plaintiffs here seek to enjoin the Governor from the performance of the duty imposed on him under this paragraph. While the duty thus imposed on him may be said to be ministerial only, and not political, it calls for the exercise of judgment on his part, and is not subject to judicial control.

It seems to be well established in this state that the courts have no jurisdiction to review any action performed by a Governor under the power conferred upon him either by the Constitution or legislative enactment. Mandamus will not lie to compel action on his part, nor will an injunction be issued to restrain such action.

In the early case of People ex rel. Sutherland v. Governor, 29 Mich. 320, 18 Am. Rep. 89, it was said: 'Our government is one whose powers have been carefully apportioned between three distinct departments which emanate alike from the people, have their powers alike limited and defined by the constitution, are of equal dignity, and within their respective spheres of action equally independent. One makes the laws, another applies the laws in contested cases, while the third must see that the laws are executed. This division is accepted as a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others. The executive is forbidden to exercise judicial power by the same implication which *forbids* the courts to take upon themselves his duties.'

....

To do this would be not only to question the wisdom of the constitution of the law, but also to assert a right to make the governor the passive instrument of the judiciary in executing its mandates within the sphere of his own duties. Were the courts to go so far, they would break away from those checks and balances of government which were meant to be checks of co-operation, and not of antagonism or mastery, and would concentrate in their own hands something at least of the power which the people, either directly or by the action of their representatives, decided to entrust to the other departments of the government.'

The *Born* Court went on to teach, as follows:

The relationship which exists between this court and the Governor of this state is quite similar to that existing between the Supreme Court of the United States and the President thereof. In Mississippi v. Johnson, 4 Wall. 475, 500, 18 L. Ed. 441, the state sought by injunction to restrain President Johnson from the execution of

the Reconstruction Acts of Congress upon the allegation that they were unconstitutional. Chief Justice Chase, speaking for the court, said:

‘The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, *448 when performed, are, in proper cases, subject to its cognizance.

‘The impropriety of such interference will be clearly seen upon consideration of its possible consequences.

‘Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court?

‘These questions answer themselves.’

Very simply, again, this Court does not have jurisdiction to issue any injunctive relief, especially *before* the Governor has acted at all. The very prematurity of such relief, bespeaks its inherent violation of the constitutional doctrine of separation of powers.

II. To Grant the relief Requested by the Plaintiff, Would deprive the Elected representative Body of the City of Detroit its *Only* Mechanism to Rid Itself of Wrongdoing Elected Officials

“The city council is the elected head of the legislative branch of city government. Its members are the *people’s closest representatives*. ”

A Report to the People by the Detroit Charter Revision Commission, p.III (emphasis added)

This Court has already ruled that the Council does not have power under the City Charter to forfeit the Mayor’s office. To now rule that the Governor cannot so act,

upon the petition of the Council, would be a clear and unacceptable intrusion of the judiciary into the political and governmental affairs of this city and state and, as such, would constitute and, again, a violation of the basic principles of separation of powers.

Defendant Council respectfully requests that Plaintiff's motions be denied.

Respectfully submitted,

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DATED: August 29, 2008

CERTIFICATE OF SERVICE

WILLIAM H. GOODMAN certifies that on the 29th day of August, 2008, he hand delivered a copy of the DETROIT CITY COUNCIL'S OPPOSITION, and this CERTIFICATE OF SERVICE upon counsel of record at the address listed above.

I declare that the statement above is true to the best of my information, knowledge and belief.

William H. Goodman (P14173)